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## FREEDOM OF CONTRACT

THE liberty mentioned in the Fourteenth Amendment of the Federal Constitution "means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned." This was written by MR. JUSTICE PECKHAM in *Allgeyer v. Louisiana*<sup>1</sup> where it was held that a state statute prohibiting in effect a contract of insurance with a company resident in a foreign state of the Union was unconstitutional.

In *Ritchie v. People*<sup>2</sup> a similar conclusion was reached from another point of view. This case involved the constitutionality of an act of the Legislature prohibiting the employment of females in any factory or workshop more than eight hours in any one day. The statute was held to be unconstitutional as an arbitrary restriction upon the fundamental right of the citizen to control his or her own time and faculties in a matter in which employer and employee are equally competent to agree. The act of the Legislature was defended as a proper exercise of the police power of the state but the court held that the Legislature could not evade constitutional limitations by an arbitrary exercise of the police power and that the final determination of a question involving the constitutional rights of the individual was for the courts. In his opinion, MACGRUDER J., said, speaking of the constitutional guaranty that no person shall be deprived of life, liberty or property, without due process of law, "The privilege of contracting is both a liberty and a property right \* \* \* and when an owner is deprived of one of the attributes of property, like the right to make contracts, he is deprived of his property within the meaning of the Constitution."

This is a very plain and elementary doctrine. So much so that it may be of interest to observe its vicissitudes before our courts during recent years. The true condition of things is very well put by CULLEN, C. J., in *People v. Grout*<sup>3</sup>: "I fear that the many outrages of labor organizations, or some of their members, have not only

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<sup>1</sup> (1896) 168 U. S. 578.

<sup>2</sup> (1895) 155 Ill. 98. *Contra* (1876) *Commonwealth v. Hamilton Mfg. Co.*, 120 Mass. 383, cited approvingly in *Holden v. Hardy*, 169 U. S. 366, 395.

<sup>3</sup> (1904), 72 N. E. Rep. 464, 467.

excited just indignation but at times have frightened courts into plain legal inconsistencies, and into the enunciation of doctrines, which, if asserted in litigations arising under any other subject than labor legislation would meet scant courtesy or consideration."

In the case of *People v. Grout*, the Comptroller of the City of New York resisted payment of a contract for the construction of ten scows for the city, on the ground that the contractor had violated the "Labor Law," providing that no laborer, workman or mechanic should be required to work more than eight hours in any one calendar day, except in the case of extraordinary emergency. Payment was resisted on the sole ground that the relator had permitted his workmen to work for more than eight hours a day. In his contract with the city the relator had agreed to comply with the provisions of the "Labor Law." It was held by a majority of the court that this failure to observe the labor law was not such a breach of contract as would entitle the city to refuse payment after the scows had been delivered to and accepted by the city. It was also held that the statute was unconstitutional in that to enforce it in this case would violate the constitutional guarantees for the protection and security of private property and the sacredness of contracts.

This case may be compared with *Atkin v. Kansas*<sup>4</sup> as bearing on the subject of

#### *Contracts With Municipalities.*

There can be no doubt but that the state, for itself or its municipalities, mere agents of the state for most purposes, may by general law specify the terms upon which it will contract with parties. There is no principle of local self-government involved.<sup>5</sup> In *Atkin v. Kansas* the state had passed a statute known as the eight-hour law. It was made applicable only to persons engaged in the performance of work for the state or some municipality of the state. The law made any officer of the state or municipality or any contractor violating the law, liable to fine and imprisonment. The court held that the law was not unconstitutional as an unauthorized interference with the right of contract. JUSTICE HARLAN said: "We rest our decision upon the broad ground that the work being of a public character, absolutely under the control of the state and its municipal agents acting by its authority, it is for the state to prescribe the conditions under which it will permit work of that kind to be done. Its action touching such a matter is final so long as it does not, by its regulations, infringe the personal rights

<sup>4</sup> (1903) 191 U. S. 207.

<sup>5</sup> *Williams v. Eggleston*, (1897) 170 U. S. 304. But see *Ryan v. City of New York*, *infra*.

of others; and that it has not done." In the forepart of the same opinion JUSTICE HARLAN also said: "Whether a similar statute, applied to laborers or employees in purely private work would be constitutional, is a question of very large import, which we have no occasion now to determine or even consider."

The cases of *Atkin v. Kansas* and *People v. Grout* can not be reconciled without difficulty, nor can they be satisfactorily distinguished. Both were, indirectly, contracts with the state and involved the expenditure of moneys, raised through the power of taxation. In the *Grout* case the city had received and accepted the property of relator and in equity and good conscience ought to pay for it, notwithstanding the statute, but in the *Atkin* case the respondent had been deprived of his personal liberty. The right of property is no more sacred than the right of personal liberty. While there is a clear distinction in contracts between individuals and contracts between an individual and the state, still neither class of cases calls for an invasion of constitutional rights. It may be said fairly that the state has the right to dictate by law the terms on which it will directly or indirectly become a party to a contract and may punish its agents or others for the offense of making contracts in violation of such laws and may enforce the observance of the law by imposing a penalty for its violation. Perhaps this was all that was intended by the *Atkin* decision, but it has been misinterpreted and carried much further, and has been urged as authority for all kinds of paternal legislation in the interest of various organizations.<sup>6</sup>

Some courts have declined to recognize any important distinction between contracts between the individual and the state and purely private contracts.

In *Ryan v. City of New York*<sup>7</sup> the Labor Law of the state provided that the wages to be paid for a legal day's work to all classes of laborers upon any public work "shall not be less than the prevailing rate for a day's work" in the locality where the work is performed. The validity of the statute was called in question as being an unconstitutional interference with the right of contract. The court, PARKER, C. J., rendering the opinion, sustained the law, holding that, so far as it relates to the direct employees of the state or of a municipality thereof, it is constitutional. HAIGHT, CULLEN and WERNER, JJ., concurred, but O'BRIEN, J., wrote a dissenting opinion, concurred in by BARTLETT and VANN, JJ., in which he said that "There can be no sound distinction in the application of the statute to the direct and immediate employees of a city and the case of an

<sup>6</sup> See O'Brien J. in *People v. Grout* (1904), 72 N. E. 468.

<sup>7</sup> (1904) 177 N. Y. 271.

independent contractor who has not observed the law.”<sup>8</sup> He calls the distinction “fanciful” and insists that the case is covered by the *Rodgers* case,<sup>9</sup> in which he, writing the prevailing opinion, said: “The people of the state at large, through their representatives, have no more authority to dictate to a city the form in which its contracts shall be framed or the wages that it shall pay to laborers than they have to dictate to an individual what he shall eat, drink or wear.”<sup>10</sup>

The case of *Rodgers v. Coler* is one of the first of the New York cases bearing on labor legislation, and in it the power of the Legislature to regulate wages of those employed upon the public work of a municipality is discussed. Rodgers as relator asked for a mandamus to compel the city of New York to pay him for regulating and grading a street, a local improvement, the expense of which was ultimately to be charged to and paid by the local property owners. The work had been properly performed and certificates of completion issued by the proper officer. The city defended on the ground that the relator had, in executing his contract of construction, violated the Labor Law in that he had not paid “his workmen not less than the prevailing rate of wages in the locality” as the law required and as he had agreed to do in his contract. It appears that at the time the decision was rendered there were pending against the city in consequence of alleged violations of the statute in question, claims aggregating over six million dollars, representing the difference in the amount actually paid by the city to its employees and what was assumed to be the prevailing rate of wages under the statute. The statute was held to be unconstitutional because it invaded the rights of liberty and property in that it denied to the city and the contractor the right to agree with their employees upon the measure of their compensation. The prevailing opinion draws a distinction between the governmental capacity and the business capacity of the city and holds that in its business capacity it makes local improvements and has the same freedom of contract as the individual. This doctrine is most certainly at variance with the law as announced in *Atkin v. Kansas*.<sup>11</sup>

As bearing on the power of the Legislature to prescribe the terms upon which individuals shall contract with the state or in its behalf the Michigan case, *Kuhn v. Detroit*,<sup>12</sup> may be referred to. The relator applied for a mandamus to compel respondent, the City of

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<sup>8</sup> (1904) 177 N. Y. 271, 281.

<sup>9</sup> (1901) 166 N. Y. 1.

<sup>10</sup> (1901) 166 N. Y. 20. Approved in *City of Cleveland v. The Clements Bros. Construction Co.* (1902), 67 Ohio St. 197.

<sup>11</sup> (1903) 191 U. S. 207.

<sup>12</sup> (1888) 70 Mich. 534.

Detroit, to approve of a liquor dealer's bond, executed by him with two sureties and filed with the common council of the city to enable him to comply with the state law licensing the sale of intoxicating liquors. The respondent answered that the bond did not comply with the statute in that the sureties had not properly justified; that they had not in their affidavit of justification sworn that they "were not engaged either as principal, agent, or servant, in the sale of any liquors mentioned in this Act." The fact was, they were engaged in the manufacture of liquors but were not retail dealers or saloon keepers. The city council disapproved the bond. The court held that the statute was unconstitutional in that it violated both the state and the Federal Constitution providing that "No person shall be deprived of life, liberty, or property without due process of law;" that the right to contract a debt or to become surety for another was a property right; that the law was also in conflict with the fourteenth amendment to the Constitution of the United States in that it made unjust and illegal discrimination between persons in similar circumstances, and the case of *Yick Wo v. Hopkins*<sup>13</sup> is cited and relied on. It should be noted, however, that the *Yick Wo* case involved the validity of a city ordinance making it unlawful to carry on a laundry business anywhere in the city of San Francisco without first having obtained the consent of the board of supervisors, *unless the laundry was located in a brick or stone building*. The case did not involve the right of contract and is not authority for the doctrine announced in the Michigan case, which holds in effect that a state can not dictate the terms upon which it is willing to become a party to a contract; that the state may require a bond but can not prescribe the qualifications of the sureties, can not say that the principal and surety shall not be engaged in the same or similar lines of business. This is carrying the freedom of contract beyond well recognized limitations.

The foregoing cases with others<sup>14</sup> that might be stated leave the principle that the state may dictate the terms upon which it will contract with the individual of doubtful application. The line of demarcation in this respect between the legislative functions and the business functions of a municipality is very dim and sometimes overlooked. Freedom of contract is, by some courts, considerably restricted, as in the *Atkin* case, and wholly unbridled as in the Michigan case. The New York doctrine, if we can tell what it is, seems to approach nearer to the constitutional guarantees of the citizen.

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<sup>13</sup> (1886) 118 U. S. 356.

<sup>14</sup> *People v. Featherstonhaugh*, 172 N. Y. 112; *Loan Ass'n v. Topeka*, 87 U. S. 655; *Board of Education v. Blodgett*, 155 Ill. 441; *Clark v. State*, 142 N. Y. 101; *Seattle v. Smyth*, 22 Wash. 327.

*Contracts Between Individuals.*

The right of contract as between individuals is no less uncertain than as between the individual and the state. It is conceded that this right as pertaining to private property or personal liberty is guaranteed by the Constitution of the state and of the nation but what limitations may be placed upon its free enjoyment present troublesome questions before the courts.

Where persons are incapacitated from giving complete assent to a contract by reason of age or infirmity or artificiality of construction or where the contract itself is of such a nature that the making of it would be detrimental to the public generally, then there is little doubt of the right and duty of the legislature to regulate or prohibit. Within this field public policy has full control, but beyond it the Constitution stands to protect the citizen in his natural rights.

"Every person *sui juris* has the right to make use of his labor in any lawful employment on his own behalf or to hire it out in the service of others."<sup>15</sup> The right of contract can not be interfered with on the pretense of public good when the general public is in no way affected by the contract. This is a necessary limitation on the much abused police power of the state.

In *Godcharles v. Wigeman*<sup>16</sup> the plaintiff had been employed as a puddler by the defendants in their rail mills. During his employment plaintiff asked for and received from defendants what were known as store orders in payment for his wages. A statute of the state prohibited the giving of store orders in payment for labor. The court held the statute to be unconstitutional for that the Legislature had attempted by the act to do what, in this country, can not be done; that is, prevent persons who are *sui juris* from making their own contracts. Mr. JUSTICE GORDON, delivering the opinion of the court, said: "The act is an infringement alike of the rights of the employer and the employee; more than this it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."<sup>17</sup>

To the same effect is the holding of the Supreme Court of the

<sup>15</sup> Cooley on Torts, 326.

<sup>16</sup> (1886) 113 Pa. St. 431. See *Knoxville Iron Co. v. Harbison* (1901), 183 U. S. 13.

<sup>17</sup> (1886) 113 Pa. St. 431, 437.

State of Illinois in *Fraser v. The People*.<sup>18</sup> An act known as the "Truck Store" act was before the court. It provided for the payment of wages in lawful money and prohibited the truck system. An action of debt was brought to recover a penalty of \$50 for violation of the statute. It was held that the statute was an unauthorized interference with the freedom of contract; that the privilege of contracting is both a liberty and a property right and that the owners of coal mines (to which the act applied) could not be prohibited from making contracts which it is competent for other owners of property or employers of labor to make.

In *Commonwealth v. Perry*,<sup>19</sup> an act prohibited the imposing of a fine by an employer upon his employee, engaged in weaving, for imperfections in work was before the court. A contract had been made under regulations permitting such fine imposed to secure faithfulness and accuracy. The court held the act unconstitutional, saying: "The right to employ weavers, and to make proper contracts with them, is therefore protected by our Constitution; and a statute which forbids the making of such contracts, or attempts to nullify them, or impair the obligation of them, violates fundamental principles of right which are expressly recognized in our Constitution."

In *Braceville Coal Co. v. The People*,<sup>20</sup> an act providing for weekly payment of wages by corporations and prohibiting the making of contracts in violation thereof was held unconstitutional, in that it deprived the citizen of his constitutional right to contract.

While there are a few cases to the contrary the foregoing fairly illustrate the weight of authority in this country. Free locomotion is of primary importance in personal liberty, but without freedom of contract the life of the individual would scarcely be worth living. It would be unfortunate indeed, if the right of contract in the individual were not protected by constitutional guarantees against various legislative notions regarding public policy and the police power of the state.

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<sup>18</sup> (1892) 141 Ill. 171, followed in *Kellyville Coal Co. v. Harrier*, 207 Ill. 624. To the same effect is *State v. Goodwill*, 33 W. Va. 179.

<sup>19</sup> (1891) 155 Mass. 117. *Contra*, *Hancock v. Yaden*, 121 Ind. 366. In this case the court held, ELLIOT J. writing, that a statute prohibiting a contract being made in advance, waiving the right to receive money in the payment of wages and agreeing to receive merchandise, is constitutional, does not unlawfully interfere with the right of contract. Such contracts "the legislature may prohibit in order to protect and maintain the lawful money of the nation." Why not for the same reason prohibit all contracts of sale and barter and make legal tender money the only medium of exchange? Neither the nation nor the individual is in need of any such protecting care from the state at the expense of freedom of contract.

<sup>20</sup> (1893) 147 Ill. 66. See also *Knoxville Iron Co. v. Harbison* (1901), 183 U. S. 13.

*Police Power of the State.*

The right of contract is possessed and enjoyed subject to the police power of the state. This power has never been defined and its relation to freedom of contract is imperfectly understood. It certainly includes the power of the state to protect itself by legislation and under it contracts which tend to defeat the ends of government or are manifestly prejudicial to the interests of the whole people may well be prohibited. Beyond this very little can be said that is satisfactory. In a recent case, in speaking of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution, Mr. JUSTICE PECKHAM said: "There are, however, certain powers, existing in the sovereignty of each state in the Union, somewhat vaguely termed police powers, the exact description and limitation of which have not been attempted by the courts. The powers broadly stated and without, at present, any attempt at a more specific limitation, relate to the safety, health, morals and general welfare of the public. Both property and liberty are held on such reasonable conditions as may be imposed by the governing power of the state in the exercise of these powers, and with such conditions the Fourteenth amendment was not designed to interfere. (*Mugler v. Kansas*, 123 U. S. 623)."

These police powers have been used so extensively during the past few years, in defense of all kinds of legislation, restraining the freedom of contract, that individual rights in the matter appear to have only a theoretical value. So called labor legislation, limiting the hours of labor that may be contracted for in any one day or week, is most common. This is generally done under the claim that such legislation is in protection of

*The Public Health.*

There has been no doubt but that the state may pass laws in preservation of the public health. The constitutional guarantees of the individual do not abridge the power of the state to do this. Of this class of legislation are laws for compulsory vaccination,<sup>21</sup> and limiting the hours of labor in all underground mines,<sup>22</sup> or in any other employment which of itself is injurious to health. State Legislatures have recently gone far beyond the limitation of these cases and have attempted to do under the guise of protecting public health some amusing things. None more so than acts passed forming examining boards for horseshoers. A statute of this kind came before the Supreme Court of New York in the case of *People v.*

<sup>21</sup> *Jacobson v. Massachusetts* (1905), 197 U. S. 11.

<sup>22</sup> *Holden v. Hardy* (1898), 169 U. S. 366.

*Beattie*.<sup>23</sup> The statute was passed to regulate the trade of horse-shoeing and prohibited the practicing the business of horseshoeing without obtaining a certificate from a board of examiners. It was held that the law had no relation to the public health and was unconstitutional, as an arbitrary interference with personal liberty and private property without due process of law. In support of the law it was urged that it was passed to protect cruelty to animals, a very proper subject of legislation. The court, however, did not accept this view. HATCH, J., said: "Doubtless the shoeing of a horse at times may have produced corns, contracted the feet, and otherwise inflicted pain, but the same thing is true in the shoeing of human beings," and neither one subject nor the other has ever been deemed to be sufficiently aggravated to call for legislation.

On the other hand, in the case of *State v. Zeno*,<sup>24</sup> it was held that a statute providing for a board of examiners of barbers and prohibiting any person from following the occupation of a barber without obtaining a license from this board was a constitutional exercise of the police power of the state in the interest of the public health. If this decision is to be followed, are we not taking the subject too seriously, or are we making it the scape goat for all kinds of doubtful legislation in establishing state boards, not for health protection, but simply to give politicians a place and at the same time to hamper and restrict competition in those ordinary pursuits which should be open and free to every citizen? The personal liberty guaranteed by the Constitution is not something purely scientific, not appreciable through the common understanding of those supposed to enjoy its blessings.

The mistake arises from presupposing that the occupation of a barber has any such relation to the public health as calls for a drastic remedy through the police power of the state.

It is urged in support of the law that it is a matter of common knowledge that, through inexperienced or uneducated barbers, diseases of the face are communicated to the innocent victims, who are willing to be shaved by unlicensed barbers and the state ought to prevent this, and all for the good of the public. It is not contended that the steel razor is in danger of being inoculated but simply that it may become infected by contact. So may the barber's chair and many other things in and out the shop. All that is needed is ordinary cleanliness, which can not be secured through any board of exam-

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<sup>23</sup> (1904) 89 N. Y. Supp. 193, cited approvingly in *People v. Lochner*, *infra*. A similar statute relating to horseshoers was held unconstitutional in *In re Aubry* (1904), 78 Pac. R. 900; *Bessette v. People*, 193 Ill. 334.

<sup>24</sup> (1900) 79 Minn. 80.

iners, sitting as experts in the art of shaving. If a person afflicted with a contagious or infectious disease goes into a shop to be shaved punish him and not the unsuspecting barber by requiring of him that he pass an examination before some board, or stand punishment, for following an ordinary avocation of life.

If it be contended that this board may insist upon the licensee showing at the examination more than ordinary proficiency in detecting the presence of infectious diseases, then carry the law to its logical conclusion and insist that only those who have received a scientific education in the diagnosis of diseases shall be permitted to follow the calling of a barber. *Reductio ad absurdum*. If there be any personal liberty left to the village blacksmith, the barber and the baker after the contending social forces have spent their fury, may the Lord temper the wind to the shorn lamb.

We may observe that the profession of barber is of great antiquity. "And then, son of man, take thee a barber's razor and cause it to pass upon thine head and upon thy beard." Ezek. v. i. Times have changed since the days of the prophets, but it is doubtful whether the state can, even now, be justified in keeping its citizens away from contamination of unlicensed barbers. Whither are we drifting over these new seas of paternalism?

In *Templar v. Board of Examiners of Barbers*,<sup>25</sup> the relator asked for a mandamus to compel the state board to permit him to take the examination provided for by law. The board had refused to examine him upon the ground that he was an alien. The statute provided that a certificate of examination should not be given an alien. This proviso was held to be unconstitutional, because it denied to a resident alien the equal protection of our laws. The right to contract and the right to pursue an ordinary calling without legislative interference through the police power of the state were not before the court for consideration and the sanction of the law was not in the crucible. If it had been, the decision might have been otherwise and in accord with the recent decision of the Supreme Court of the United States in relation to bakers.<sup>26</sup>

The power of the state to license occupations requiring police protection, or extra hazardous occupations, or to establish boards of examiners over the recognized professions in scientific education, is unquestioned. This may well be done under the police power of the state, but before going further we may well refer to the fundamentals in constitutional government.

"The general rule undoubtedly is, that any person is at liberty to

<sup>25</sup> (1902) 131 Mich. 254.

<sup>26</sup> But see *Ex parte Daniel Lucas* (1900), 160 Mo. 218.

pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right can not be taken away. It is not competent, therefore, to forbid any persons or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them."<sup>27</sup>

Perhaps the most important of recent cases on this subject is *People v. Lochner*.<sup>28</sup> The prevailing opinion in this case was written by PARKER, Ch. J. It involved the constitutionality of an act regulating hours of labor in bakeries and confectionary establishments. The full text of the act is given in the opinion. Only a portion of the first section is important here. It provides that "No employee shall be required *or permitted* to work in a biscuit, bread or cake bakery or confectionery establishment more than sixty hours in any one week, or more than ten hours in any one day, unless," etc. Defendant was convicted of a misdemeanor in violating this act. In support of the law it was urged that it was enacted to protect the health and safety of the public by regulating the sanitary condition of the bakery and confectionery establishments of the state; that therefore it comes within the police power of the state; that in a business which is dangerous the state has the right to regulate the hours of labor that an employee shall perform in one day or in one week, and that the law in question affects alike all persons similarly situated and, therefore, none are unjustly discriminated against.

It was urged against the law that it is void for the reason that it interferes with the freedom of individuals to enter into a contract with one another; that it can not be upheld as a proper exercise of the police power under a claim that it is a health measure; that there is no reasonable connection with it and the public health, and finally that bakers are unjustly discriminated against.

An important question was squarely before the court. Was the police power of the state so far above the fundamental law of the land, state and national, that any and all kinds of sumptuary legislation might claim its protection? The manifest ulterior purpose of the act in question was to raise the value of wages and increase the demand for labor. This may be a very proper thing to do, but how far it can be done through legislation without doing violence to the constitutional freedom of contract is the whole question. Certainly it ought not to be done under the guise of public health when no question of public health is involved.

The so-called ten-hour law was sustained by a divided court.

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<sup>27</sup> Cooley, Cons. Lim. (7th Ed.), 889.

<sup>28</sup> (1904) 177 N. Y. 145, 160.

PARKER, Ch. J., speaking for the majority, held the act "is an exercise of the police power of the Legislature relating to the public health, and therefore violates no provision of the state or Federal Constitution." This opinion is based mainly on *The Slaughter House Cases*,<sup>29</sup> the *Laundry Case*,<sup>30</sup> and the *Eight-Hour Law Case*.<sup>31</sup> in the Supreme Court of the United States and referred to above. Each one of these cases is based on a well recognized ground involving the public health and not simply the health of the individual as a party to a contract, except possibly the *Laundry Case*, which did not affect directly the right of contract at all. The learned Chief Justice's views are concurred in by GRAY, VANN and HAIGHT, JJ., the two former writing opinions. JUSTICE VANN quotes at length from the writings of scientists to show that work in bake houses is not healthful, as for example, "The inhalation of impure air in occupations associated with a very dusty atmosphere renders the lungs less capable of resisting infection." (Osler's Practice of Medicine, 269.)<sup>32</sup> If every scientific fact so simple and elementary as this may be made use of in support of paternal legislation under the police power of the state, there will soon be left very little freedom of action to the individual.

To the judgment of the court O'BRIEN and BARTLETT, JJ., write dissenting opinions. MARTIN, J., concurs with them.

O'BRIEN, J., in speaking of the police power of the state, says in this case: "The legislature may not under the guise of a statute to protect some wrong, real or imaginary, arbitrarily strike down private rights and invade personal freedom or confiscate private property." \* \* \* "When it is manifest, as it is in this case, that the law has no relation to the subject of health, and that its real object and purpose was to regulate the hours of labor between master and servant in a business which is private and not dangerous to morals, or to health, freedom to contract with each other, defining their mutual obligations, can not be prohibited without violating the fundamental law."<sup>33</sup>

BARTLETT, J., in his dissenting, declines to take seriously the unhealthy condition of bakeries. He insists that the grinding of steel in needle factories and working in underground mines is "not to be confounded with the avocation of the family baker engaged in the necessary and highly appreciated labor of producing bread, pies, cake and other commodities, more calculated to cause dyspepsia in

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<sup>29</sup> (1872) 83 U. S. 36.

<sup>30</sup> (1884) 113 U. S. 27.

<sup>31</sup> (1897) 169 U. S. 366.

<sup>32</sup> (1904) 177 N. Y. 172.

<sup>33</sup> (1904) 177 N. Y. 183, dissenting opinion by O'BRIEN J.

the consumer than consumption in the manufacturer." Again, "The country miller of fifty years ago who passed a long and happy life amid the hum of machinery and the grinding process of the upper and nether stones, little dreamed of a coming day when the legislature, in the full panoply of paternalism, would rescue his successor from the appalling dangers of the life he led until old age summoned him to retire." This is not argument, but the best way after all to unmask a pretense is by ridicule and it is the only way where a major premise does not admit of serious consideration.

This case was taken to the Supreme Court of the United States on error and the decision of the New York court was reversed on the ground that the statute in question was an unconstitutional restraint on the freedom of contract.<sup>34</sup>

The opinion of the court was delivered by Mr. JUSTICE PECKHAM. Mr. JUSTICE HARLAN wrote a dissenting opinion, concurred in by Mr. JUSTICE WHITE and Mr. JUSTICE DAY. Mr. JUSTICE HOLMES also wrote a dissenting opinion. Mr. JUSTICE PECKHAM in the prevailing opinion said: "We think the limit of the police power has been reached and passed in this case. There is, in our judgment, no reasonable foundation for holding this to be necessary or appropriate as a health law to safeguard the public health, or the health of the individuals who are following the trade of a baker. If this statute be valid, and if, therefore, a proper case is made out in which to deny the right of an individual, *sui juris*, as employer or employee, to make contracts for the labor of the latter under the protection of the provisions of the Federal Constitution, there would seem to be no length to which legislation of this nature might not go.

\* \* \* "It might be safely affirmed that almost all occupations more or less affect the health. There must be more than the mere fact of the possible existence of some small amount of unhealthiness to warrant legislative interference with liberty. It is unfortunately true that labor, even in any department, may possibly carry with it the seeds of unhealthiness. But are we all, on that account, at the mercy of legislative majorities?"<sup>35</sup>

The learned justice, after calling attention to the various occupations that might be brought under the control of the legislature if the law were sustained, concludes, saying: "We do not believe in the soundness of the views which uphold this law. On the contrary we think that such a law as this, although passed in the assumed exercise of the police power, and as relating to the public health, or the health of the employees named, is not within that power, and is

<sup>34</sup> Decided April 17, 1905.

<sup>35</sup> *Lochner v. State*, in U. S. Supreme Court, decided April 17, 1905.

invalid. The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the right of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which they may agree upon with the other parties to such contracts."

After calling attention to the fact that the interference on the part of the legislatures of the several states with the ordinary trades and occupations of the people seems to be on the increase, Mr. JUSTICE PECKHAM adds: "It is impossible for us to shut our eyes to the fact that many of the laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives. We are justified in saying so when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears but the most remote relation to the law. The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put into operation, and not from their proclaimed purpose. The court looks beyond the mere letter of the law in such cases."<sup>36</sup>

If the Supreme Court of the United States continues to look beyond the proclaimed purpose of a law and to judge of its constitutionality from the manifest motives for its enactment, there will be found in a few years much waste paper in the statute laws of our several states. Nothing is better known than that a large part of the paternal legislation of recent years, relating to the ordinary callings in life, has been enacted and defended on one pretended purpose or another when the real purpose and effect of the law are in violation of the letter and spirit of the Federal Constitution.

Mr. JUSTICE HARLAN, in a dissenting opinion, in the *Lochner Case*, said: "It is plain that this statute was enacted in order to protect the physical well being of those who work in bakery and confectionery establishments." After having suggested that there might have been an ulterior object, he said further: "Be this as it may, the statute must be taken as expressing the belief of the people of New York that, as a general rule, and in the case of the average man, labor in excess of sixty hours during a week in such establishments may endanger the health of those who thus labor. Whether or not this be wise legislation is not the province of the court to

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<sup>36</sup> Citing *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebman*, 138 U. S. 78; *Yick Wo v. Hopkins*, 118 U. S. 356.

inquire. Under our system of government, the courts are not concerned with the wisdom or policy of legislation."

The prevailing opinion is in effect that the court will inquire into the policy of legislation far enough to ascertain whether its purpose and effect are, in reality, to evade and defeat those constitutional guarantees intended for the benefit of the individual as against unjust legislation by the state.<sup>37</sup>

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## MANDAMUS AGAINST A GOVERNOR

THE question whether the courts have the power to issue the writ of mandamus against the chief executive of a state to compel the performance of a duty imposed upon him by law, has been answered in two irreconcilable lines of decision—the one being that the Governor is not answerable to the writ to compel the performance of his duty, be it either discretionary or ministerial in its character, the other, that he is liable to the writ to compel the performance of duties purely ministerial in nature. Mr. High, in his work on *Extraordinary Legal Remedies*,<sup>1</sup> says:

"The jurisdiction of courts by mandamus over executive officers, including Governors of states, heads of executive departments of the general government, and others of kindred nature, has given rise to questions of much difficulty, and not a little conflict of authority has resulted from the efforts of the courts to apply the general principles of the law of mandamus to such cases. And while, as to purely executive or political functions devolving upon the chief executive officer of the state, and as to duties necessarily involving the exercise of official judgment and discretion, the doctrine may be regarded as uncontroverted that mandamus will not lie, yet as to duties of a ministerial nature and involving no element of discretion, which have been imposed by law upon the Governor of a state, the authorities are exceedingly conflicting and indeed utterly irreconcilable."

The views adopted by the different courts are stated in *Spelling on Extraordinary Relief*<sup>2</sup> thus: "No little conflict exists as to the

<sup>37</sup> See *State v. Dodge* (Vt.), 56 Atl. R. 983, holding the "Anti Trading Stamp Law" of Vermont an unconstitutional interference with the right of the citizen to contract. *People v. Gillson*, 109 N. Y. 389.

<sup>1</sup> § 118 (3rd Ed.).

<sup>2</sup> Vol. II, § 1452.